

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MORGAN BARTLETT, et al.,

Plaintiffs,

v.

SAFECO INSURANCE COMPANY,

Defendant.

CASE NO. C13-1658 RAJ

ORDER

This matter comes before the court on an expedited Local Civil Rule 37 motion. Dkt. # 9; Local Rules W.D. Wash. CR (“LCR”) 37. Defendant moves for an order allowing a structural engineer to inspect plaintiffs’ vacation home on Whidbey Island under Rule 34. Plaintiff opposes and requests the court to deny defendant’s motion and to enter a protective order pursuant to Rule 26(c).<sup>1</sup>

On January 30, 2013, plaintiffs’ home on Whidbey Island was destroyed. The parties dispute the cause: Plaintiffs claim that the damage was caused by a tree, which is

---

<sup>1</sup> It is unclear to the court why plaintiffs have cited Washington Civil Rules of Procedure and Washington State cases on procedural issues before this court. The Federal Rules of Civil Procedure and federal case law interpreting the Federal Rules of Civil Procedure apply to all procedural issues before the court. The court recognizes that the rules are similar. However, the court does not find the Washington State cases persuasive as to issues of procedure currently before this court.

1 covered, and defendant asserts that the damage was caused by debris flow originating in a  
2 landslide, which is not covered. The parties also dispute whether plaintiffs initially  
3 informed defendant that the damage was caused by a tree: Plaintiffs assert that they  
4 reported that the house was damaged by a falling tree when they first reported the loss,  
5 and defendant asserts that plaintiffs' insurance agent reported that a landslide had  
6 occurred and half buried the home. Plaintiffs represent that defendant sent an inspector  
7 on February 1, 2013 to take pictures and measurements and to analyze the scene.<sup>2</sup> On  
8 February 13, 2013, defendant sent a geotechnical engineer to inspect the property. On  
9 March 15, 2013, the geotechnical engineer determined that the cause of the damage to the  
10 home was debris flow originating in a landslide. Dkt. # 10-1 at 6 (Ex. 1 to Abendschein  
11 Decl.). On April 12, 2013, counsel for plaintiffs provided the report of General  
12 Contractor Paul L. Johnson, who opined that the loss was caused by a falling tree. Dkt. #  
13 10-3 at 4 (Ex. 3 to Abendschein Decl.). In response, defendant requested an inspection  
14 by a structural engineer, which plaintiffs denied. Plaintiffs filed suit on August 13, 2013,  
15 and the case was removed to this court on September 13, 2013. On October 25, 2013,  
16 defendant propounded its Rule 34 request for inspection of land for Monday, November  
17 25, 2013. The parties met and conferred and filed the pending Rule 37 expedited motion.

18 The court has broad discretion to control discovery. *Avila v. Willits Envtl.*  
19 *Remediation Trust*, 633 F.3d 828, 833 (9th Cir. 2011). That discretion is guided by  
20 several principles. Most importantly, the scope of discovery is broad. A party must  
21 respond to any discovery request that is "reasonably calculated to lead to the discovery of  
22 admissible evidence." Fed. R. Civ. P. 26(b)(1). The court, however, must limit  
23 discovery where its "burden or expense . . . outweighs its likely benefit, considering the  
24 needs of the case, the amount in controversy, the parties' resources, the importance of the  
25

---

26  
27 <sup>2</sup> Plaintiffs represent that the first inspector was Diane L. Starling, whose credentials  
include an Associate in Management and an Associate in Claims.

1 issues at stake in the action, and the importance of the discovery in resolving these  
 2 issues.” Fed. R. Civ. P. 26(b)(2)(C)(iii). A party may move the court for a protective  
 3 order from “annoyance, embarrassment, oppression or undue burden or expense,  
 4 including . . . forbidding the disclosure or discovery . . . [and] forbidding inquiry into  
 5 certain matters, or limiting the scope of disclosure or discovery to certain matters[.]”  
 6 Fed. R. Civ. P. 26(c)(1)(A) & (D).<sup>3</sup> “If a motion for a protective order is wholly or partly  
 7 denied, the court may, on just terms, order that any party or person provide or permit  
 8 discovery.” Fed. R. Civ. P. 26(c)(2). Rule 34 permits entry onto property possessed or  
 9 controlled by a party to inspect, measure, survey, photograph, test, or sample the property  
 10 or any designated object or operation on it. Fed. R. Civ. P. 34(a)(2).

11 Defendant has not previously propounded a Rule 34 request. The court recognizes  
 12 that two individuals have previously inspected the property prior to this lawsuit being  
 13 filed. However, the inspection is not cumulative because defendant has not had a  
 14 structural engineer examine the property to determine the cause of the loss. The court  
 15 finds that plaintiffs have not demonstrated good cause to prohibit the Rule 34 inspection  
 16 because the request is not unreasonably cumulative or burdensome. Plaintiffs readily  
 17 admit that they are not currently living at the destroyed property. There is no evidence  
 18 that they will be unduly burdened by the inspection.<sup>4</sup> Additionally, plaintiffs are parties  
 19 to this action, not third parties whose privacy interests may be at risk. Finally, the court  
 20

---

21  
 22 <sup>3</sup> The court notes that plaintiffs have not moved the court for a protective order. Rather,  
 23 plaintiffs have asked the court for a protective order in opposition to defendant’s motion to  
 24 compel inspection of the land. Nevertheless, for purposes of this order, the court will consider  
 plaintiffs’ request as a motion this time.

25 <sup>4</sup> Plaintiffs argue that if the Bartletts are forced to keep the house in its current condition  
 26 until November 25, it will be impossible, due to the onset of winter weather, to do anything with  
 27 the house until Spring 2014. This motion was noted on the court’s calendar for November 13,  
 2013. The court was unable to render a decision on this motion until today due to its heavy  
 docket. Accordingly, the court finds that waiting a few more days until November 25, 2013 will  
 not change the outcome of the arrival of winter weather at this point.

1 finds that an inspection by a structural engineer is material to defendant's defense  
2 regarding the cause of the loss.

3 For all of the foregoing reasons, the court GRANTS defendant's motion to compel  
4 inspection of land pursuant to Rule 34. Dkt. # 9. The inspection shall proceed on  
5 November 25, 2013 as scheduled. Dkt. # 11 at 23-25.

6  
7 Dated this 21st day of November, 2013.

8   
9

10 The Honorable Richard A. Jones  
11 United States District Judge  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27